

DISSENTING OPINION BY NAKAYAMA, J.,
WITH WHOM RAMIL, J., JOINS

I respectfully dissent. For the reasons discussed in my dissent in State v. Garcia, No. 23513 (Haw. Sup. Ct. August 10, 2001) (Nakayama, J., dissenting), I believe that State v. Wilson, 92 Hawaii 45, 987 P.2d 268 (1999), was wrongly decided and should be overruled.

In order to invoke the exclusionary rule, a defendant must prove that the evidence was obtained unlawfully and in violation of his or her constitutional rights. State v. Pattioay, 78 Hawaii 455, 466, 896 P.2d 911, 922 (1995). However, where appropriate, evidence unlawfully obtained without a constitutional violation may be suppressed under this court's supervisory powers. Id. at 469, 896 P.2d 925. This court should only invoke its supervisory powers only in exceptional circumstances, id. at 469 n.28, 896 P.2d at 925 n.28, and should determine on a case-by-case basis . . . whether the rationales underlying the exclusionary rule are served and whether the law violation warrants its application. Id. at 471, 896 P.2d at 927.

Such exceptional circumstances did not exist in Wilson because the implied consent statute does not create a voluntary right of choice and does not provide for the remedy of suppression in criminal DUI prosecutions where the defendant was not fully informed of the administrative consequences. Wilson, 92 Hawaii at 55-58, 987 P.2d at 278-82. Further, the warning

given Wilson was not so misleading as to coerce or trick him into consenting and did not imply that taking the test was a safe harbor, free of adverse consequences. Id. at 59, 987 P.2d at 282. Therefore, the remedy of suppression was not appropriate.

In my view, Wilson was wrongly decided and should have been overruled in Garcia. Because the warning given to Tavares contained the same error as the warning given to Wilson and because the actual administrative revocation imposed upon Tavares was three months,¹ the length of time that he was warned he could receive, suppression is not appropriate in the present case. I would affirm the circuit court's order denying Tavares's motion to suppress and the judgment of conviction and sentence.

¹ The three-month revocation was subsequently rescinded on procedural grounds.